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Supreme Court of the United States

OCTOBER TERM, 1987

PETER LARM, M.D., and HARUKO LARM,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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No. ____

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QUESTIONS PRESENTED

1. Whether a defendant convicted in a Medicaid fraud prosecution has been denied due process of law when (1) the false statements charged are literally true and (2) no properly promulgated statute or regulation provides unambiguous and adequate written notice

that the statements could be deemed false under the particular circumstances.

2. Whether the materiality of a false statement made in violation of 42 U.S.C. Section 1396h(a) is a question of law for the trial court or a question of fact for the jury.

PARTIES

The petitioners are Peter Larm, M.D., and Haruko Larm, the defendants below, who were convicted of 17 and 94 counts of Medicaid fraud, respectively, in the District of Hawaii on November 25, 1985.

The respondent is the United States of America, the plaintiff below.

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OPINION BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported as United States v. Larm, 824 F.2d 780 (9th Cir. 1987) and is reproduced in the Appendix to this petition.

JURISDICTION

On August 12, 1987, the Court of Appeals for the Ninth Circuit affirmed the convictions entered against Peter Larm, M.D., and Haruko Larm on November 25, 1985. The Court of Appeals for the Ninth Circuit denied a petition for rehearing on September 30, 1987. This petition for a writ of certiorari was filed within sixty days of that order.

The District Court for the District of Hawaii had subject matter jurisdiction pursuant to 18 U.S.C. Section 3231. The Court of Appeals for the Ninth Circuit had jurisdiction pursuant to 28 U.S.C.

Section 1291. This Court has jurisdiction pursuant to 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. United States Constitution, Fifth Amendment, which provides in relevant part, "No person shall be . . . deprived of life, liberty, or property without due process of law . . . ."

2. 42 United States Code Section 1396h(a)(1), which provides in relevant part as follows:

> (a) Making or causing to be made false statements or representations.
>
> Whoever . . . (1) knowingly and willfully makes or causes to be made any false statement or representation of a material fact in any application for any benefit or payment under a State plan approved under this subchapter, . . . shall (i) in the case of such a statement, representation, concealment, failure, or conversion by any person in connection with the furnishing (by that person) of items or services for which payment is or may be made under this subchapter, be guilty of a felony and

> upon conviction thereof fined not more than $25,000 and imprisoned for not more than five years or both . . . .

3. Hawaii Rev. Stat. Section 91-2(b) which provides in relevant part as follows:

> No agency rule, order, or opinion shall be valid or effective against any person or party, nor may it be invoked by the agency for any purpose, until it has been published or made available for public inspection as herein required . . . .

STATEMENT OF THE CASE

This petition concerns the Medicaid fraud convictions of Peter Larm, M.D., and his wife, Haruko Larm, under 42 U.S.C. Section 1396h(a)(1). The jurisdiction of the trial court was based on 18 U.S.C. Section 3231.

Dr. Peter Larm and Haruko Larm were each indicted in the District of Hawaii on November 29, 1983 on ninety-eight counts of Medicaid fraud. Petitioners entered pleas of not guilty and moved

pretrial to dismiss the indictment on due process grounds, asserting that they were denied fair notice that the conduct for which they were charged was criminal. Petitioners also moved pretrial for an order requiring the respondent to provide a bill of particulars specifying any statute, regulation or rule upon which the respondent relied in claiming that petitioners' conduct was illegal. The district court (King, D.J.) denied both motions per order dated January 18, 1985. The motion to dismiss was renewed at the close of the respondent's case-in-chief and post-trial and was denied on each occasion.

Trial commenced on October 15, 1985 and the case was submitted to the jury for its consideration on October 29, 1985. The jury returned its verdicts on October 31, 1985. Dr. Larm was found guilty on Counts 21, 22, 56, 57, 58, 84,

and 88 through 98 of the indictment. Haruko Larm was found guilty on counts 1 through 94 of the indictment.

On November 25, 1985, Dr. Larm was sentenced on Count 21 to a term of imprisonment of five years, fined the statutory maximum of $25,000.00, and assessed $21,500.00 as the cost of prosecution. On each of the remaining counts, Dr. Larm was sentenced to a concurrent five-year prison term. Execution of the prison sentences were suspended and Dr. Larm was placed on probation for five years on condition that he perform 200 hours of community service.

Haruko Larm was sentenced to a term of imprisonment of five years and fined $25,000.00 on Count 1. She was also sentenced to a concurrent five-year prison term on each of the remaining counts. The court suspended the

execution of the prison terms and placed Mrs. Larm on probation for five years on condition that she also perform 200 hours of community service.

STATEMENT OF FACTS

At the commencement of this action, Dr. Peter Larm had maintained a medical practice specializing in treatment of allergies for approximately twenty years. He had a primary office in Honolulu on the island of Oahu and a second office, which he visited on Mondays and Tuesdays, in Hilo on the island of Hawaii. Haruko Larm, Dr. larm's wife, acted as his unofficial office manager and oversaw billing and other paperwork.

Dr. Larm's allergy treatment program commenced with a complete medical history and physical examination of each new patient. A series of intradermal skin tests was administered to determine if

the patient was allergic to particular substances. This initial session required three to four hours.

If an allergy was discovered, the patient would be placed on a treatment program of increasingly potent allergy injections until the patient reached a maintenance level. During the initial treatment period, injections were administered weekly. Over the course of treatment, the frequency of injections was gradually reduced to once per month. Timing of injections was of critical importance, particularly during the early stages of treatment. Therefore, it was sometimes necessary to schedule patients for treatment even when the doctor was away from the office. When this occurred, Dr. Larm would insist that the patient schedule an extra office visit so that he could personally see the patient.

Dr. Larm would not charge for those additional visits.

Payment for treatment of many of Dr. Larm's patients was made through the Hawaii Medicaid Program, which is administered by the Department of Social Services and Housing of the State of Hawaii (DSSH) and provides services to persons unable to pay for medical care. The program which began in Hawaii in 1966 with very little documentation and no provider manual, is funded on a fifty-fifty basis by the state and federal governments. A private agency, the Hawaii Medical Service Association (HMSA), acting under contract with DSSH, is the fiscal intermediary responsible for receiving, reviewing and paying claims submitted by providers of services under the program such as Dr. Larm.

Physicians were required to bill the Medicaid Program on claim forms provided

by HMSA. Providers were required to use code numbers to designate the particular services rendered. These code numbers were taken primarily from the 1970 Relative Value Studies (RVS), a publication prepared by the Hawaii Medical Association, but never approved under the Hawaii Administrative Procedures Act.

During the course of Dr. Larm's participation in the Medicaid Program, petitioners filed hundreds of claim forms with HMSA. Ninety-eight of the claims which were filed between July 3, 1979 and June 15, 1983, became the subject of an indictment when DSSH and the respondent decided that petitioners had made false statements on those forms.

One element of falsity alleged as to each of Counts 1 through 94 concerned the use of RVS code 90040, which was one of the designations for "office visit."

Code number 90040 was defined in the RVS as "Brief examination, evaluation and/or treatment, same or new illness." "Brief examination, evaluation or treatment" was further defined as "[o]ne concerning a relatively simple problem requiring a short period of time." Petitioners used this code number whenever a patient visited the office to receive an allergy injection, whether or not the doctor was physically present at the time. The respondent contends that a claim under code 90040 may only be made if the physician personally sees the patient in the office at the time the patient receives the service. Respondent asserts that the filing of any claim under 90040 constitutes a certification that the doctor personally rendered the service.

Counts 95 through 98 did not involve "office visit" claims, but did concern services not personally rendered by Dr.

Larm. Specifically, claim forms were filed for the administration of allergy injections which Dr. Larm did not personally administer. Respondent contends that the presentation of the four claims in question implies that he did, in fact personally render the service. Therein lies the alleged false statement.

The 98 counts of Medicaid fraud charged under 42 U.S.C. Section 1396h(a)(1) fall into four different categories. Counts 1 through 58 concern the submission of claims for payment for "office visits" that petitioners filed or caused to be filed, although Dr. Larm was not personally present at the time services were rendered because he was on the mainland at medical conferences. As to Counts 59 through 84, petitioners submitted claim forms for payment for office visits by patients in Honolulu,

although Dr. Larm neither personally saw the patients nor personally rendered the services because he was at his office in Hilo on those dates. With regard to Counts 85 through 94, Dr. and Mrs. Larm submitted claims for "office visits" and "administration" of injections to patients although Dr. Larm neither saw the patients nor personally rendered the services. With regard to Counts 95 through 98, Dr. and Mrs. Larm submitted claim forms for "allergy injections" to the patients although Dr. Larm did not personally render the service on the dates represented in the claims.

There was never an allegation that Dr. Larm's patients did not, in fact, visit his office on the dates shown on those claim forms seeking payment for "office visits." Nor was it the respondent's contention that patients did not receive "administration" of injections and

"allergy injections" on the dates shown in the claim forms seeking payment for those particular services. The significant contested issue at trial was whether Dr. Larm's failure to personally render the services in question, whether an "office visit," "administration" or "allergy injection," made the claims for payment fraudulent and the statements supporting those claims false.

Respondent asserted that the Larms had been put on notice of the requirement that Dr. Larm was required to personally render the services as a prerequisite to filing a claim. A public relations representative from HMSA named Gary Taylor testified that he had spoken with the Dr. and Mrs. Larm on two or three occasions and had advised them that they could not bill for office visits if the doctor had not personally rendered services.

The total amount of overcharges alleged to have been obtained through the 98 claims was $882.21.

REASONS FOR GRANTING THE WRIT

I. HOLDING PETITIONERS CRIMINALLY LIABLE FOR THE ALLEGED FALSE STATEMENTS CONSTITUTES A DENIAL OF DUE PROCESS AND VIOLATES STANDARDS OF FAIR NOTICE ESTABLISHED BY THIS COURT

In Lambert v. California, 355 U.S. 255, 258 (1957), Justice Douglas noted:

> Engrained in our concept of due process is the requirement of notice. Notice is sometimes essential so that the citizen has the chance to defend charges. Notice is required before property interests are disturbed, before assessments are made, before penalties are assessed. Notice is required in a myriad of situations where a penalty or forfeiture might be suffered for mere failure to act.

It has long been settled that there are no federal common law crimes. Krulewitch v. United States, 336 U.S. 440 (1949); see also, Liparota v. United States, 471 U.S. 419, 424 (1985). There is "no jurisdiction in the federal courts to try

criminal charges based on the common law and . . . all federal crimes must be based on statutes of Congress." United States v. Best, 573 F.2d 1095 (9th Cir. 1978). Such a requirement ensures that no person shall be subject to criminal penalty unless fair notice is given of the acts to which criminal liability may attach.

The crux of each of the charges in the indictment was that petitioners had made a false statement concerning services rendered on each of the ninety-eight claim forms submitted to the Hawaii Medicaid Program. In virtually every instance, however, the services listed on the forms were in fact provided. The patients had visited the doctor's office and received their allergy injections. The respondent took the position, however, that the billing of these services constituted the making of false

statements, because the doctor was required under the program to perform them himself. If they were performed by other properly trained persons, including nurses, that was insufficient. If the respondent was either incorrect that such a requirement existed or there was insufficient or faulty notice of such a requirement, then there was no falsity, no crime, and no case against the petitioners.

Title 42 United States Code Section 1396h(a)(1) criminalizes the making of a false statement in any claim submitted to the Medicaid Program. There is no contention that the statute itself is faulty in providing notice generally. However, the requirement of notice does not end there. The theory of prosecution in this case is that Medicaid providers could not apply for payments for office visits under the Hawaii Medicaid Program

unless they personally saw the patient and rendered the services. In order to criminalize such an act, there must be some rule that adequately advises providers of the risk of making a claim when services have not been personally provided.

The statutory and regulatory scheme which governed the Medicaid Program in Hawaii failed to give proper notice that billing the program for services not personally performed by the doctor could result in criminal liability. No enforceable statue, rule or regulation containing such a provision was in existence at the time petitioners made the statements which were later construed as false. The respondent has been unable to cite any authority for the proposition that the type of services rendered, and for which Dr. Larm sought compensation,

must in all cases be rendered by the doctor personally.

Moreover, the RVS itself contains no express requirement that a physician personally perform all services for which his office intends to seek payment. The "requirement" that was the sine qua non of the respondent's case against the petitioner's simply did not exist.

At trial the respondent relied exclusively upon the testimony of one witness, Gary Taylor, to demonstrate that petitioners had actual notice of the requirements imposed by the Medicaid Program with respect to billing for services not personally rendered. Taylor was a public relations employee of HMSA who had verbally advised the Larms of his understanding of the billing rules. He testified that he had told them that they could not bill for office visits if Dr. Larm was not present.

This sort of oral advice, unless it is supported by a valid statute, rule or regulation, could not form the basis of criminal liability. It matters little what Taylor told the Larms, because whatever he told them is still subject to an inquiry as to its inherent accuracy. Taylor had no administrative authority to promulgate or interpret the written rules of DSSH, HMSA or the RVS. If he advised the Larms in terms that conflicted with the written material provided to them, the Larms were under no duty to abide by Taylor's interpretation.

Billing code 90040 was described in the applicable guidelines as "Brief examination, evaluation and/or treatment, same or new illness." "Brief examination, evaluation or treatment" was further defined as "[o]ne concerning a relatively simple problem requiring a short period of time." These guidelines are literally

at odds with Taylor's interpretation which is mirrored by that of the respondent. Contrary to the assertions of Taylor, DSSH, HMSA and respondents, DSSH's published guidelines make no mention of the physician's presence under billing code 90040.

A review of the additional written materials provided by HMSA over the years reveals no support for respondent's interpretation of the billing requirements. In 1972, HMSA sent out a memorandum to providers defining the billing code in question, 90040, as simply "subsequent office visit, same illness." In 1975, HMSA distributed another memorandum defining the same code number as "subsequent office visit." Finally, in 1983, HMSA issued a new physician's manual which defined 90040 as "subsequent office visit, follow-up visit by the patient for the same illness."

"The Larms' use of code 90040 was literally correct under HMSA's definition. The administration of a shot is indisputably a '[b]rief . . . treatment,' including a 'rendering of service.'" United States v. Larm, 824 F.2d 780, 785 (9th Cir. 1987) (Wiggins, J., dissenting). The literal truth of the statements precludes prosecution. United States v. Bronston, 409 U.S. 352 (1973) (evasive witness does not commit perjury so long as he speaks literal truth); see also, United States v. Sainz, 772 F.2d 559, 562-565 (9th Cir. 1985); United States v. Poutre, 646 F.2d 685 (1st Cir. 1980). In the absence of some legislative or administrative holding to the contrary, the terms of these guidelines cannot infer anything that is not explicitly stated.

The government and its agencies cannot issue imprecise or ambiguous regulations

in the form of billing codes and thereby require physician-providers to guess at their meaning. Such a callous disregard for the concept of fair notice cannot be tolerated. If HMSA intended to restrict the use of code 90040 to services personally rendered by and in the physical presence of a physician-provider, it had the means to do so. It could have issued guidelines which stated those requirements. However, it chose not to precisely articulate the physical-presence requirement and therefore should be barred from subjecting Dr. Larm and his wife to prosecution. The imprecision of the government should not be permitted to lead a physician-provider into unwitting criminality. See, United States v. Bronston, supra; see also, United States v. Ryan, 828 F.2d 1010, 1017 (3d Cir. 1987) (arguably truthful answer to ambiguous question on credit

application cannot serve as basis for false statement conviction).

Judge Wiggins addressed the issue of curing the ambiguity by Taylor's oral advice:

> Nor was the ambiguity cured by the HMSA claims examiner's [sic] oral advise to the Larms that code 90040 was proper only if the physician personally treated the patient. A government employee's oral advise in the interpretation of an unclear government regulation is too weak a foundation upon which to base a false statement prosecution. The inherent uncertainties of oral interpretations counsel against such a prosecution. . . .

Larm, 824 F.2d, at 785 (Wiggins, J., dissenting).

Although Judge Wiggins went on to state that "[t]he physician-provider has no basis to evaluate whether the employee's interpretation is the official one . . . .," Larm, 824 F.2d, at 785, that is not entirely correct. The physician-provider should be able to look to the guidelines and rely upon their

clear meaning in guiding his actions. If they are not clear, the physician should not be prosecuted for pressing a reasonable interpretation. Larm, 824 F.2d, at 785 (Wiggins, J., dissenting), citing United States v. Dahlstrom, 713 F.2d 1423, 1428 (9th Cir. 1983); United States v. Garber, 607 F.2d 92, 100 (5th Cir. 1979), cert. denied, 466 U.S. 980 (1984).

The rule of lenity is applicable in this case. "[A]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." Rewis v. United States, 401 U.S. 808, 812 (1971). See also, United States v. Bass, 404 U.S. 336, 348 (1971) ("because of the seriousness of criminal penalties and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity"). It

has often been noted that "a fair warning should be given to the world in language that the common world will understand of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear." McBoyle v. United States, 283 U.S. 25, 27 (1931). "That criminal statutes are to be construed strictly is a proposition which calls for the citation of no authority." United States v. Bramblett, 348 U.S. 503, 509 (1955).

Petitioners do not merely complain that they were without notice that making the statements in question might result in criminal liability. They vehemently reject any theory that would permit DSSH, HMSA or Gary Taylor to graft on a physician-presence requirement absent proper regulatory procedures. Assuming, arguendo, that HMSA was correct about the existence of such a requirement, any such

guidelines were unenforceable, because they were not properly promulgated.

Section 346-59(a) of the Hawaii Revised Statutes provides in pertinent part as follows:

> The department [of social services and housing] shall adopt rules under chapter 91 concerning payment to providers of medical care.

Chapter 91 of the Hawaii Revised Statutes, the Hawaii Administrative Procedure Act, Section 91-2(b) (hereinafter, the "APA"), provides as follows:

> No agency rule, order, or opinion shall be valid or effective against any person or party, nor may it be invoked by the agency for any purpose, until it has been published or made available for public inspection as herein required, except where a person has actual knowledge thereof.

Section 91-3 of the APA requires notice, public hearings and approval by the governor as conditions precedent to the validity of an agency rule. Section 91-4 provides that a rule adopted in

conformity with Section 91-3 only becomes effective if it is filed with the Lieutenant Governor's Office. See Otani v. Contractors License Board, 51 Haw. 673 (1970); State v. Lee, 51 Haw. 673 (1970).

In Aguiar v. Hawaii Housing Authority, 55 Haw. 478 (1974), the Hawaii Supreme Court held that even the "actual knowledge" exception of Section 91-2(b) cannot serve to validate rules that were otherwise invalid due to noncompliance with the APA.

Since state law requires DSSH to promulgate rules and regulations governing payment to providers of health services under the Hawaii program pursuant to the APA, rules not enacted under the APA are unenforceable under its terms. See, APA, Section 91-2(b).

HMSA, as a private agency, has no independent authority to make rules carrying the force and effect of law.

The rules and regulations promulgated by DSSH have never expressly provided that a physician must personally see a patient as a prerequisite to billing the program for services.

Unless the physical-presence policy (requiring billed services to have been personally performed by a doctor) was formalized pursuant to the statutorily prescribed procedure, it was simply not enforceable against petitioners. During the course of these proceedings, respondent has been absolutely unable to demonstrate that such a policy or rule was adopted in conformity with Chapter 91. Nor have petitioners found such a rule among the numerous DSSH rules properly on file with the Lieutenant Governor.

The fact that the existence of an applicable rule was so crucial to the government's case from the face of the

indictment itself rendered it error for the court to have denied petitioners' various motions to dismiss. In the face of both the government's failure to identify such a rule and the literal truth of the petitioners' statements on the claims forms, the government should not have been permitted to proceed with the prosecution. The pretrial error was compounded at trial and upon petitioners' post-trial motion at which time it was even more obvious that the government's case as to virtually all of the counts depended entirely on the assertion that the Medicaid Program would not pay for services not personally rendered by the doctor. See, United States v. LaBar, 521 F.Supp. 203 (M.D. Pa. 1981).

The absence of a rule rendered Taylor's purported advice to the Larms not only erroneous, but unenforceable under the law. Given that fact,

petitioners were not required to follow the advice. See Heckler v. Community Health Service, 81 L.Ed.2d 42 (1984). Moreover, the threat to the concept of due process of law is manifest under the circumstances of the Ninth Circuit's decision in this case. Due process and fundamental fairness are certainly violated when a state first enacts a mandatory provision that agency rules not promulgated in compliance with the APA may not be invoked for any purpose and next makes such an improperly promulgated rule the basis for a criminal prosecution. Such an exceptional deviation from standards of due process cannot be tolerated. It comports with neither the law of the Ninth Circuit nor the law of the land, since it has been previously well-established that administrative rules that are found to be in violation of notice and comment

requirements are void and ineffective. See, e.g., Alaniz v. Office of Personnel Management, 728 F.2d 1460, 1468 (Fed. Cir. 1984), citing, Western Oil and Gas Association v. United States Environmental Protection Agency, 633 F.2d 803, 812-13 (9th Cir. 1980); Hutch v. United States, 212 F.2d 280, 283 (9th Cir. 1954); see also, Chrysler Corp. v. Brown, 441 U.S. 310, 313 (1979) (regulations subject to the Federal APA cannot be afforded the 'force and effect of law' if not promulgated pursuant to statutory procedural minimums found in the Act); Morton v. Ruiz, 415 U.S. 199 (1974).

If DSSH had acted properly under state law, it would have provided notice in the form of rules adopted pursuant to the APA. It did not and instead chose to rely upon the oral advice of Gary Taylor. The absence of an enforceable rule

governing the allegedly criminal conduct deprived petitioners of the notice required by the due process clause as a matter of law. Although Section 1396h(a)(1) may in most cases be sufficient to apprise providers as to what is prohibited, under the facts of the instant case, the statute was nothing more than an abstract and distant warning wholly lacking in substance. Additional information was necessary to give fair notice to petitioners.

As was observed by this Court in United States v. Pennsylvania Chemical Corp., 411 U.S. 655 (1973), "to the extent that . . . regulations [deprive a defendant] of fair warning as to what conduct the Government intended to make criminal, we think there can be no doubt that traditional notions of fairness inherent in our system of criminal justice prevent the Government from

proceeding with the prosecution." 411 U.S. at 674. In the instant case, the government's unfairness must be seriously questioned. The indecorous nature of this prosecution of a physician for putative overcharges in the amount of $882.21 cannot be underestimated. It commenced as an investigation conducted by the State Medicaid Fraud Control Unit. The prosecutor who presented the matter to the federal grand jury was the state's attorney acting under a special appointment. This case did not involve merely a federal officer's decision to prosecute under federal law, but can be seen as the state's attempt to circumvent and defy its own statutory provisions forbidding the invocation of unpromulgated regulations "for any purpose." Under these circumstances, the conviction should be reversed in its entirety.

Moreover, even were this case to be reviewed on a claim of insufficiency of the evidence, it must be reversed. The standard of such a review is whether, viewing the evidence in the light most favorable to the government, "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." United States v. Lipkis, 770 F.2d 1447 (9th Cir. 1985).

An offense charged under 42 U.S.C. Section 1396h(a)(1) involves the following essential elements: (1) a false statement; (2) knowingly and willfully made; (3) involving a material fact; and (4) contained in an application for payment under a state plan approved under Title XIX.

Petitioners suggest that in the case of a prosecution under Section 1396h(a)(1), as with one under 18 U.S.C.

Section 1001, the government bears the burden of proving beyond a reasonable doubt that a statement alleged to be false is false under any reasonable interpretation. United States v. Adler, 623 F.2d 1287 (8th Cir. 1980). Applying this principle to the evidence in the instant case, the government has not carried its burden.

The government's theory on Counts 1 through 94, all involving claims for office visits, was that the mere inclusion of an office visit charge on the claim forms constituted a representation that Dr. Larm had seen the patient on the date in question. Since, with respect to most of these counts, the patients had actually gone to the doctor's office and received their injections, a literal interpretation of the words "office visit" would certainly not support an inference of falsity.

Indeed, the evidence indicating that the patients had visited the office rendered the use of the term "office visit" eminently reasonable.

Since only a validly adopted rule could have transformed this reasonable description of what had actually occurred into a false one, the absence of an enforceable rule must be considered in weighing the evidence. Because the respondent could not demonstrate that all the requirements of the APA had been complied with, no rational trier of fact could have found the element of falsity beyond a reasonable doubt as to each count involving an office visit charge.

Furthermore, there was no evidence that Haruko Larm prepared or reviewed even a single one of the ninety-eight claim forms. The respondent relied solely upon the fact that Haruko Larm was the office manager. Such proof was

insufficient. There was a total absence of any evidence that she was aware of when the doctor may have seen patients or rendered services.

II. THE COURTS OF APPEALS ARE DIVIDED OVER WHETHER THE MATERIALITY OF A PUTATIVE FALSE STATEMENT IS A MATTER OF LAW TO BE DETERMINED BY THE COURT OR AN ISSUE OF FACT TO BE CONSIDERED BY THE JURY

The test for determining the materiality of a false statement is whether or not "it is one that could affect or influence the exercise of governmental functions." United States v. Talkington, 589 F.2d 415, 416 (9th Cir. 1979).

As has been argued above, the policy of requiring the doctor to personally render all services billed was unenforceable due to the absence of a properly adopted rule. This being the case, whether Dr. Larm did or did not

personally render services could not have influenced HMSA, as it would be required to pay under either circumstance. Furthermore, Dr. Larm insisted upon seeing each patient personally promptly after any office visit at which he was not present. He did not file claims and bill the Medicaid Program for those subsequent visits, although he certainly would have been entitled to do so. Even if respondent could substantiate its theory that the services billed for must be personally rendered, Dr. Larm was, in fact, undercharging the Medicaid Program rather than overcharging it, because of his failure to bill the followup visits. Therefore as to all counts relating to office visit charges, the element of materiality cannot be held to have been proved.

Moreover, petitioners contend that the

court improperly instructed the jury when it charged them as follows:

> The making of a false statement to the Hawaii Medicaid Program is not an offense unless the statement made is a material statement. The issue of materiality, however, is not submitted to you for your decision, but rather is a matter for the decision of the Court. And you are instructed that the statements charged in the indictment are material statements.

Petitioners assert that the same standard of materiality that is applied to statements under 18 U.S.C. Section 1001 should be applied to statements under 42 U.S.C. Section 1396h, the terms of which are parallel. Petitioners further assert that whether a putatively false statement is material is an issue of fact to be resolved by the jury. United States v. Valdez, 594 F.2d 725 (9th Cir. 1979); United States v. Irwin, 654 F.2d 671, 677, n.8 (10th Cir. 1981)

There exists a division among the various courts of appeals as to whether

this approach is appropriate. See Greber v. United States, 474 U.S. 988 (1985) (White, J., dissenting to denial of certiorari). The courts of appeals for the First, Third, Fourth, Fifth and Sixth Circuits maintain a contrary view to that of the Ninth and Tenth. United States v. Corsino, 812 F.2d 26, 31, n.3 (1st Cir. 1987); United States v. Greber, 760 F.2d 68, 72-73 (3d Cir. 1985); Nilson Van & Storage v. Marsh, 755 F.2d 362, 367 (4th Cir. 1985), cert. denied, 471 U.S. 818 (1985); United States v. Thompson, 811 F.2d 841, 845, n.4 (5th Cir. 1987) (examining the treatment of materiality under 18 U.S.C. Section 1014); United States v. Abadi, 706 F.2d 178, 180 (6th Cir. 1983), cert. denied, 464 U.S. 821 (1983); United States v. Keefer, 799 F.2d 1115, 1126 (6th Cir. 1986). They hold that materiality of a statement is a

matter of law to be determined by the judge under Section 1001.

There is also a lack of consistency with respect to the treatment of false statements under different statutes. For example, it is plausible that the Larms could have been prosecuted for their statements under Section 1001 of Title 18 rather than under Section 1396 of Title 42. United States v. Simon, 510 F.Supp. 232 (E.D.Pa. 1951). If such were the case, in the Ninth Circuit, the issue of materiality would have been one for the jury, United States v. Valdez, supra, rather than one for the trial judge. The Ninth Circuit's decision to follow the lead of the Eighth Circuit, United States v. Brown, 763 F.2d 984, 993 (8th Cir. 1985), as to the issue of materiality under Section 1396 is inexplicable in light of its holding in Valdez.

Another anomalous result has been reached in the Fifth Circuit. There the issue is treated as one of law for the court, but the trial court may be required to receive expert testimony on the matter. United States v. Lueben, 816 F.2d 1032, 1033 (5th Cir. 1987).

The materiality of statements under Sections 1621 and 1623 of Title 18, relating to perjury, has historically been determined by the trial court. See, Sinclair v. United States, 279 U.S. 263, 298-299 (1929). Petitioners need not challenge the merit of such a procedure with respect to perjurious statements made before judicial or quasi-judicial bodies. Judges are peculiarly well-suited to the task of determining what statements are material in the context of such proceedings. See, United States v. Larranaga, 787 F.2d 489, 494 (10th Cir. 1986). However, that particular

expertise of judges does not provide such a distinct advantage over the common sense of jurors that these petitioners and others should be denied the opportunity to argue to the jury the materiality of statements made in non-judicial contexts.

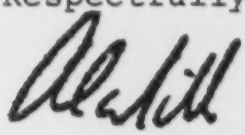
Justice White's dissent in Greber, supra, addressed the conflict among the circuit courts with regard to Section 1001 of Title 18. The problem is not as limited as that dissent implies. Every statute which addresses false statements made outside of the judicial context is implicated in this dispute, whether they are in the context of Medicaid claims, tax returns, credit applications or the like.

Accordingly, petitioners ask this Court to grant certiorari and reverse the order of the court of appeals.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,



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Dated: New York, New York
November 29, 1987

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

PETER LARM, M.D., and HARUKO LARM,
Defendants-Appellants.

No. 85-1348
D.C. Nos.
CR-83-2460-01
CR-83-2460-02
OPINION

Argued and Submitted
April 13, 1987—San Francisco, California

Filed August 12, 1987

Before: J. Clifford Wallace, Anthony M. Kennedy and Charles Wiggins, Circuit Judges.

Opinion by Judge Kennedy; Partial Concurrence Partial Dissent by Judge Wiggins

Appeal from the United States District Court
for the District of Hawaii
M.D. Crocker, Senior U.S. District Judge, Presiding

SUMMARY

Medicare/Criminal Procedure

Appeal from convictions. Affirmed.

This action arises from appellants the Larms' convictions for making false statements in applications for payments in a

federally-approved plan for medical assistance. The indictment alleged that the Larms submitted claims to the Hawaii Medical Service Association (HMSA) for office visits although Dr. Larm neither saw the patients nor personally rendered services (office visit counts), that the Larms claimed administration charges for injections which the patients administered themselves (administration counts), and that the Larms falsely submitted claims for allergy shots (allergy counts). The Larms' principal contention is there was insufficient evidence of guilt.

[1] In each of the office and administration counts the Larms used billing code 90040, although [2] billing code 90030, appearing on the same page as 90040, fits exactly the service rendered in the office visit counts. [3] Furthermore, an HMSA representative testified that he twice informed the Larms that a 90040 billing required the physician's presence. [4] There is also ample evidence that the Larms knew of the falsity of their statements. [5] The weight of authority requires the conclusion that the district court properly treated the question of whether the statements made were material as one of law.

Judge Wiggins argues that the Larms should not be criminally liable for making a false statement when the statement they made was literally true under code 90040, HSMA's ambiguous billing codes.

COUNSEL

Peter L. Yee, Honolulu, Hawaii, for the plaintiff-appellee.

Richard K. Perkins and Renee M.L. Yuen, Honolulu, Hawaii, for defendants-appellants.

OPINION

KENNEDY, Circuit Judge:

Peter Larm, M.D., and his wife Haruko Larm, appeal from their convictions for violations of 42 U.S.C. § 1396h(a)(1) (false statements in an application for payments in a federally-approved plan for medical assistance). We conclude there was sufficient evidence to support the convictions, and that the district court did not otherwise err. We affirm.

Dr. Larm is an allergist and was an approved provider of Medicaid Services under Hawaii's Medicaid Program from July 1979 to June 1983. Mrs. Larm was his office manager during that period. The Hawaii Department of Social Services and Housing administers the program, and the Hawaii Medical Service Association (HMSA) handles the claims. The HMSA claim forms have a coding system to allow for prompt, uniform determination of the services provided and the appropriate reimbursement. A code book contains a brief explanation of the service to be matched with the codes on the claim form.

In 1984 the grand jury indicted the Larms on ninety-eight counts of Medicaid fraud. Counts 1-84 (office visit counts) alleged that the Larms submitted claims to the HMSA for "office visits" although Dr. Larm neither saw the patients nor personally rendered the services. Counts 85-94 (administration counts) alleged that the Larms not only claimed false office visit charges, but also administration charges for injections which the patients administered themselves. Counts 95-98 (allergy counts) alleged that the Larms falsely submitted claims for allergy shots. The total of the excess charges was $882.21.

The jury convicted Dr. Larm on seventeen counts which involved claim forms he signed, and acquitted him on the

other charges. The jury convicted Mrs. Larm, who oversaw all the billing, on all but the allergy counts.

The Larms principal contention is there was insufficient evidence of guilt. To prevail on this argument, they must show that no rational jury could find guilt beyond a reasonable doubt. *See Jackson v. Virginia,* 443 U.S. 307, 324 (1979). To prove Medicaid fraud, the government must show a knowingly false statement of material fact made in an application for benefits from a federally approved state Medicaid plan. *See* 42 U.S.C. § 1396h(a)(1).

[1] The Larms' most serious attack on the office visit counts is that the statements were not false. It is undisputed that in each of the office visit counts (and the administration counts) the Larms used billing code 90040. Code 90040 is defined as a "[b]rief examination, evaluation and/or treatment, same or new illness." This is further defined as "includ[ing] a brief or interval history, examination, discussion of finding and/or rendering of service." The treatment given in each case was a routine allergy shot administered by a nurse, when Dr. Larm was not in the office. The Larms argue that this treatment fits within the meaning of the definition, and the evidence of falsity was thus insufficient.

[2] Two factors converge to convince us of the sufficiency of the evidence of falsity. The first is that code 90030, appearing on the same page as 90040, is defined as follows: "Minimal service: injections, minimal dressings, etc., not necessarily requiring the presence of a physician." This code fits exactly the service rendered in the office visit counts. Since each code corresponds to a different billing amount, it is clear that these codes are intended to be exclusive of each other. The snug fit between 90030 and the service actually rendered forecloses any argument that 90040 was the correct code.

[3] The second factor is that an HMSA representative testified that he twice informed the Larms that a 90040 billing

required the physician's presence. Although the Larms attack the credibility of this testimony, the jury was entitled to believe the HMSA representative. The evidence of falsity on the office visit counts was sufficient.

The Larms next argue that they did not knowingly and willfully make the false statements. We have explained why the evidence supports a finding that the statement was false. It remains to be shown also that the Larms knew of the falsity, for an element of the crime is the specific intent to make a false statement. *United States v. Crooks*, 804 F.2d 1441, 1448 (9th Cir. 1986).

[4] There is ample evidence of knowledge of falsity. Mrs. Larm managed the office and oversaw the billing process. Dr. Larm signed all the claims that formed the bases for his convictions. The testimony that an HMSA representative called the Larms' attention to the point is also relevant. These facts were sufficient to allow the jury to find the Larms knew that code 90040 was being used.

The Larms argue that the government failed to prove that the claims were part of a federally approved program. However, an HMSA official testified that the federal government oversees the program, and therefore the Larms' argument is meritless.

We turn now to the sufficiency of the evidence on the administration counts. The administration counts combine a charge that the Larms used code 90040 falsely, as well as charging for the administration of injections that the patients administered themselves. For the reasons we discussed above, the jury could properly find that the use of code 90040 was knowingly false. The testimony established that the patients did in fact self-administer the serum, and the Larms knew that an administration charge was inappropriate. The evidence was sufficient on the administration counts.

Dr. Larm also challenges the sufficiency of the evidence on the allergy counts. One of his nurses testified that on the occasions recited in the indictment, he charged for more expensive allergy serum when the medication actually given was less expensive bee extract serum. The nurse testified that she reported the overcharge to Dr. Larm, and he replied that his office "would make an adjustment." No adjustment was ever made, and the jury was entitled to credit the nurse's testimony. There was sufficient evidence on the allergy counts.

[5] The Larms finally contend that the district court erred in not instructing the jury on the question whether the statements made were material, but rather deciding for itself that the statements were material as a matter of law. The Larms rely on *United States v. Valdez,* 594 F.2d 725 (9th Cir. 1979). In *Valdez* the government charged that the defendants forged employment letters for the purpose of gaining aliens visas to enter the country, a violation of 18 U.S.C. § 1001. We concluded that the materiality of the letters was an issue of fact for the jury. However, we have since limited *Valdez.* In *United States v. Flake,* 746 F.2d 535 (9th Cir. 1984), *cert. denied,* 469 U.S. 1225 (1985), we concluded that the question of whether false statements on a tax return were material was for the judge. We discussed *Valdez,* and ultimately distinguished it solely on the grounds that we were "concerned with a different statute." *Flake,* 746 F.2d at 537. In *Flake* we also noted that a long line of cases has applied or made mention of the rule that the materiality of a perjured statement is a question of law. *See, e.g., Sinclair v. United States,* 279 U.S. 263, 298 (1929); *United States v. Taylor,* 574 F.2d 232, 235 (5th Cir.), *cert. denied,* 439 U.S. 893 (1978); *United States v. Percell,* 526 F.2d 189, 190 (9th Cir. 1975); *Carroll v. United States,* 16 F.2d 951, 953 (2d Cir.) (cited with approval in *Sinclair*), *cert. denied,* 273 U.S. 763 (1927). We find no principled way to distinguish this case from the perjury cases. Both concern the question of whether a false statement is reasonably calculated to induce reliance. Further, the Eighth Circuit has concluded that materiality under section 1396h(a)(1) is a

question of law. *See United States v. Brown,* 763 F.2d 984, 993 (8th Cir.), *cert. denied,* 106 S. Ct. 273 (1985). Absent some good reason to do so, we are disinclined to create a direct conflict with another circuit. We think, therefore, that the weight of the authority requires us to conclude that the district court properly treated the question as one of law. Even, however, if we were to reach the opposite result, we would conclude that the error was harmless, because the statements here undoubtedly were material, designed as they were to induce payment. *See Valdez,* 594 F.2d at 729 (overwhelming evidence of materiality made treating it as an issue of law harmless error).

The Larms make a due process challenge to their conviction. They point out that the code book was never adopted as a rule in conformance with the Hawaii Administrative Procedure Act. *See* Haw. Rev. Stat. §§ 91-3 - 91-15. They argue they lacked fair notice that their conduct was illegal.

This argument is without merit. The Larms were prosecuted under 42 U.S.C. § 1396h(a)(1), not the billing codes. The statute gives fair notice of the proscribed conduct. The codes only become relevant because they inform us on the question of whether the statements were false. The Larms knew that writing code 90040 on the claim form would cause the HMSA to act under the misapprehension that Dr. Larm had actually seen the patient, and the fact that code 90040 was not a formally adopted administrative regulation is irrelevant.

It is the statute that must give sufficient notice of the proscribed conduct, both through adequate promulgation and definiteness in its language. *See United States v. Harriss,* 347 U.S. 612, 617 (1954). Here, the statute forbids knowingly false material statements, terms that are adequate to inform the ordinary person of its bounds. Any attack on the billing codes which formed the factual backdrop that made the statements false is ultimately an attack on the sufficiency of the

evidence. *See id.* at 618 (a statute is not void for vagueness despite the existence of borderline cases of applicability). If the Larms had proved that they did not know of the codes, or had proved that the codes were too vague to be understood, then there could be no knowingly false statement. But the jury found that they understood the significance of the billing codes that they used, and the record supports this finding.

The judgment of the district court is AFFIRMED.

WIGGINS, Circuit Judge, concurring in part and dissenting in part:

I respectfully dissent from that portion of the opinion affirming the Larms' convictions on the office visit counts. The Larms should not be criminally liable for making a false statement under 42 U.S.C. § 1396(h)(a)(1) when the statement they made was literally true under HMSA's ambiguous published billing codes.

The Larms used code 90040 to bill HMSA for nurse-administered allergy shots when Dr. Larm was not in the office. This, the majority holds, is a false statement on an application for Medicaid because code 90040 requires that the physician personally have treated the patient. However, HMSA's published guidelines defining code 90040 make no mention of the physician's presence, requiring instead a "[b]rief examination, evaluation and/or treatment, same or new illness," "includ[ing] a brief or interval history, examination, discussion of finding and/or rendering of service." The Larms' use of code 90040 was literally correct under HMSA's definition. The administration of a shot is indisputably a "[b]rief . . . treatment," including a "rendering of service."

I agree that an alternate code more closely tracked the type of service the Larms provided. The guidelines define code

90030 as "Minimal service: injections, minimal dressings, etc., not necessarily requiring the presence of a physician." But the literal truth of the Larms' statement under code 90040 precludes a prosecution for making a false statement in an application for Medicaid under section 1396(h)(a)(1). *See Bronston v. United States,* 409 U.S. 352 (1973) (wily witness who succeeds in derailing questioner does not commit perjury so long as he speaks literal truth); *United States v. Sainz,* 772 F.2d 559, 562-65 (9th Cir. 1985) (same); *see also United States v. Poutre,* 646 F.2d 685 (1st Cir. 1980) (18 U.S.C. § 1001, prohibiting false statements to federal officials, cannot be invoked when an evasive statement is literally true).

When the government issues imprecise billing codes, physician-providers should not have to guess at their meaning at the risk of criminal prosecution under section 1396(h)(a)(1). If HMSA wishes to restrict the use of code 90040 to services physically provided by the physician, it can do so. But the government cannot subject a physician to prosecution for falsely stating that he complied with the physical presence requirement unless it precisely articulates that requirement. *Bronston,* 409 U.S. at 362 ("Precise questioning is a predicate for the offense of perjury"); *Sainz,* 772 F.2d at 564 (a witness "cannot be forced to guess at the meaning of the question to which he must respond upon peril of perjury").

Nor was the ambiguity cured by the HMSA claims examiner's oral advise to the Larms that code 90040 was proper only if the physician personally treated the patient. A government employee's oral advise on the interpretation of an unclear government regulation is too weak a foundation upon which to base a false statement prosecution. The inherent uncertainties of oral interpretations counsel against such a prosecution. The physician-provider has no basis to evaluate whether the employee's interpretation is the agency's official one. Indeed, it is conceivable that the physician could receive conflicting

advise from different government employees on the interpretation of the regulation.

Absent an authoritative agency interpretation—preferably published—clarifying the agency's ambiguous billing codes, it is improper to prosecute a doctor for pressing a reasonable code interpretation. *See United States v. Dahlstrom,* 713 F.2d 1423, 1428 (9th Cir. 1983) (prosecution under 26 U.S.C. § 7206(2) for willful filing of false tax returns is inappropriate for a taxpayer's advocating a tax shelter, the legality of which was "completely unsettled by any clearly relevant precedent") (citing *United States v. Garber,* 607 F.2d 92, 100 (5th Cir. 1979) (a criminal prosecution under section 7206 "is an inappropriate vehicle for pioneering interpretations of tax law")), *cert. denied,* 466 U.S. 980 (1984); *see also Bell v. United States,* 349 U.S. 81, 83-84 (1955) (rule of lenity requires resolving ambiguity in criminal statute in favor of defendant).

The Larms' use of code 90040 was literally true under HMSA's ambiguous guidelines. The claims examiner's oral advise did not cure the ambiguity. Consequently, the Larms' convictions on the office visit counts should not stand.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

CR. NO. 83-2460

UNITED STATES OF AMERICA,

Plaintiff,

vs.

PETER LARM, M.D. and
HARUKO LARM,

Defendants.

ORDER DENYING MOTION FOR JUDGMENT OF ACQUITTAL OR IN THE ALTERNATIVE FOR NEW TRIAL OR ARREST OF JUDGMENT

Defendants' Motion for Judgment of Acquittal or In The Alternative for New Trial or Arrest of Judgment having come on for hearing before this Court on November 25, 1985, and the Court having been fully advised in the premises;

IT IS HEREBY ORDERED that the above-

mentioned motion is DENIED.

DATED: Honolulu, Hawaii:
December 30, 1985.

/S/ M.D. CROCKER
Judge of the above-entitled Court

Approved as to Form:

RICHARD K. PERKINS, ESQ.

Renee Yuen
Richard K. Perkins
Attorneys for Defendants,
PETER LARM, M.D.
HARUKO LARM

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

CR. NO. 83-2460

UNITED STATES OF AMERICA,

Plaintiff,

vs.

PETER LARM, M.D. and
HARUKO LARM,

Defendants.

ORDER ACCEPTING MAGISTRATE'S REPORT
AND RECOMMENDATIONS

Defendants Peter Larm and Haruko Larm have filed objections to Reports and Recommendations filed by Magistrates Tokairin and Gedan. Defendants object to a Report and Recommendation filed on October 2, 1984, by Magistrate Tokairin relating to discovery, a bill of particulars, and production of grand jury transcripts. Defendants also object to a Report and Recommendation filed on

November 1, 1984 by Judge Gedan, relating to defendants' motion to dismiss.

This court must make a de novo determination of those portions of the reports which are objected to by the defendants. 28 U.S.C. S 636(b)(1)(c); Local Rules IV.B.5.c.

Having reviewed the Report and Recommendation of Magistrate Tokairin, the memoranda, pleadings and record of the hearings, it is the finding of the court that the Magistrate's Report and Recommendation be accepted.

IT IS HEREBY ORDERED that Magistrate Tokairin's Report and Recommendation of October 2, 1984, and Magistrate Gedan's Report and Recommendation of November 1, 1984 are ACCEPTED.

DATED: Honolulu, Hawaii, January 18, 1985.

/S/ SAMUEL P. KING
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CR. NO. 85-1348
(D.C. Nos. CR-83-2460-01
and CR-83-2460-02)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

PETER LARM, M.D. and
HARUKO LARM,

Defendants-Appellants.

Appeal from the United States District
Court for the District of Hawaii

Before: WALLACE, KENNEDY, andWIGGINS,
Circuit Judges.

Judges Wallace and Kennedy have voted to deny the petition for rehearing; Judge Wiggins has voted to grant the petition for rehearing. The panel has voted to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc hearing, and no

judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35 (b).

The petition for rehearing is denied, and the suggestion for a rehearing en banc is rejected.